

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

*In re: Nexium (Esomeprazole Magnesium)  
Antitrust Litigation*

MDL No. 2409 pending in Massachusetts

Civil Action No. 1:12-md-02409-WGY (D.  
Mass.)

Miscellaneous Action No.

**MOTION OF JEFFREY A. POTT TO QUASH  
SUBPOENA TO APPEAR AND TESTIFY AT TRIAL**

Jeffrey A. Pott, global General Counsel for Defendant AstraZeneca, respectfully moves pursuant to Federal Rules of Civil Procedure 45 and 43 to quash a trial subpoena served on him by Plaintiffs in the *In re: Nexium (Esomeprazole Magnesium) Antitrust Litigation* MDL pending in the United States District Court for the District of Massachusetts. *See* No. 1:12-md-02409-WGY. The subpoena purports to require Mr. Pott to travel to the Philadelphia courthouse on the first day of trial in the *Nexium* matter and to remain there until, at some point during the anticipated six-week trial in Boston, he is called to testify by Plaintiffs via remote video transmission.<sup>1</sup> Mr. Pott moves to quash the subpoena on the grounds that (1) Plaintiffs have not shown “good cause in compelling circumstances” as required by Rule of Civil Procedure 43(a) to compel his testimony from a remote location; and (2) it unduly burdens him in violation of Rule of Civil Procedure 45(d)(1).

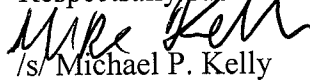
A supporting memorandum of law and proposed Order are attached.

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<sup>1</sup> After the subpoena issued, the district court rescheduled the trial’s start date from October 6, 2014 to October 20, 2014.

Dated: September 17, 2014

Respectfully submitted,

  
/s/ Michael P. Kelly

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MCCARTER & ENGLISH, LLP  
Michael P. Kelly  
Renaissance Centre  
405 N. King Street, 8th Floor  
Wilmington, DE 19801  
Ph: 302-984-6301  
Fax: 302-984-2493  
mkelly@mccarter.com

Joshua Roberts  
BNY Mellon Center, Suite 700  
1735 Market Street  
Philadelphia, PA 19103

WILLIAMS & CONNOLLY LLP  
Dane H. Butswinkas (Of Counsel)  
John E. Schmidtlein (Of Counsel)  
Paul B. Gaffney (Of Counsel)  
725 Twelfth Street, N.W.  
Washington, DC 20005  
Ph: 202-434-5000  
Fax: 202-434-5029  
DButswinkas@wc.com  
JSchmidtlein@wc.com  
PGaffney@wc.com

*Counsel for Jeffrey A. Pott, AstraZeneca LP,  
AstraZeneca AB, and Aktiebolaget Hässle*

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Civil Action No. 1:12-md-02409-WGY (D.  
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Miscellaneous Action No.

**MEMORANDUM IN SUPPORT OF MOTION OF JEFFREY A. POTT  
TO QUASH SUBPOENA TO APPEAR AND TESTIFY AT TRIAL**

Jeffrey A. Pott, global General Counsel for Defendant AstraZeneca, moves to quash a subpoena served on him by Plaintiffs on August 30, 2014. *See* Ex. 1 (Subpoena to J. Pott). The subpoena calls for Mr. Pott to appear at the federal courthouse in Philadelphia beginning on October 6, 2014, and, at some unspecified point thereafter to offer live trial testimony via remote video transmission in a proceeding—*In re: Nexium (Esomeprazole Magnesium) Antitrust Litigation*, No. 1:12-md-02409-WGY—taking place contemporaneously in federal court in Boston.<sup>1</sup> Rule of Civil Procedure 43(a) permits such a radical departure from the well-settled conventions of trial practice only when there is “good cause in compelling circumstances.” Plaintiffs do not come close to meeting that standard—Plaintiffs were free to obtain testimony from Mr. Pott during the MDL’s fact discovery period, but elected not to depose him.

**BACKGROUND**

The *In re Nexium* MDL consists of class actions and other lawsuits coordinated before Judge William G. Young of the District of Massachusetts. Plaintiffs bring federal and state antitrust claims challenging patent settlements between AstraZeneca and three generic

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<sup>1</sup> After the subpoena issued, the district court rescheduled the trial’s start date from October 6, 2014 to October 20, 2014.

pharmaceutical manufacturers (Ranbaxy, Teva, and Dr. Reddy's) involving the drug Nexium. Nexium is the brand name for esomeprazole magnesium, a "proton-pump inhibitor" that treats gastrointestinal disorders. With Food and Drug Administration's approval, AstraZeneca has marketed esomeprazole magnesium under the name Nexium since 2001. In 2005 and 2006, Ranbaxy, Teva, and Dr. Reddy's sought permission from FDA to market generic versions of Nexium before the expiration of numerous AstraZeneca patents. Pursuant to federal law, Ranbaxy, Teva, and Dr. Reddy's filed certifications asserting that their proposed versions of generic Nexium would not infringe any valid patent for AstraZeneca's brand Nexium. In response, AstraZeneca filed separate patent infringement lawsuits against the generic manufacturers, which the parties later settled. Under the terms of the settlements, Ranbaxy, Teva, and Dr. Reddy's each agreed to accept licensing agreements permitting them to launch their proposed generic Nexium before AstraZeneca's patents expired.

Plaintiffs sued more than four years after the settlements were entered into and approved. They allege the settlements contained impermissible "reverse payments" in violation of federal and state antitrust laws, *see FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2227 (2013), and delayed market entry of generic Nexium, thereby causing them to pay supracompetitive prices for brand Nexium. The Judicial Panel on Multidistrict Litigation transferred the cases to Judge Young in 2012. Trial is now scheduled to begin on October 20, 2014.

Earlier this year, Plaintiffs filed in the MDL Court a Motion for Live Trial Testimony via Contemporaneous Transmission [ECF No. 830]. Plaintiffs sought from Judge Young relief that was unorthodox, to say the least: an order under Rules of Civil Procedure 43(a) and 45 compelling witnesses Plaintiffs desired to call at trial, who they could not subpoena to testify in Boston, to appear at courthouses around the country for live trial testimony by remote video

transmission. Plaintiffs sought this relief even though they had secured the videotaped depositions of nineteen witnesses during discovery, understood that all of the witnesses in the case did not reside within the subpoena power of the trial court, and at no point had suggested those depositions were insufficient for trial or that Plaintiffs had been limited in obtaining deposition testimony from other, or more relevant witnesses. The clerk's notes from the hearing reflect that Judge Young granted the motion. Ex. 2 (7/17/14 Clerk's Notes and Order). Judge Young did not, however, compel the remote testimony of any witnesses or enter a protocol for such testimony submitted by Plaintiffs. Judge Young instead advised the parties from the bench that "the burden is entirely on the plaintiffs. Don't think I'm going to bat in some other court and our video hookups go court to court. The burden is entirely on you." Ex. 3 (7/11/14 Tr. at 26, 30-31).

In advance of the October 6 (now October 20) trial date Plaintiffs have served more than a dozen non-party subpoenas calling for live trial testimony via remote video transmission. Plaintiffs served Mr. Pott, who is AstraZeneca's global General Counsel and whom Plaintiffs chose not to depose during discovery. The subpoena calls for him to appear at the federal courthouse in Philadelphia on the first day of trial, and to return there every day until he is called to testify and his remote testimony is complete.

### **ARGUMENT**

#### **I. PLAINTIFFS HAVE NOT SHOWN "GOOD CAUSE IN COMPELLING CIRCUMSTANCES" FOR THE EXTRAORDINARY RELIEF THEY SEEK.**

Rule of Civil Procedure 45(c)(1) sets forth the manner and circumstances in which parties generally may secure live trial testimony from witnesses. It provides that "a subpoena may command a person to attend a trial . . . only" if the trial court is "within 100 miles of" or, in certain circumstances, "within the state[,] where the person resides, is employed, or regularly

transacts business in person.” Fed. R. Civ. P. 45(c)(1). If a witness is outside the trial court’s subpoena power, a party may, in lieu of live testimony, play the videotape (or read the transcript) of the witness’s deposition testimony instead. *See* Fed. R. Civ. P. 32(a)(1), (4). These basic rules of practice are applied every day by district courts around the country in both the most simple and complex of cases, and there is no reason they should not apply here. Mr. Pott lives in Pennsylvania and works in Delaware; as such, he indisputably is outside the subpoena power of the District of Massachusetts and cannot be compelled to present live testimony in a trial taking place in that District.

Plaintiffs seek to circumvent these Rules by asking the Court to invoke a narrow (and rarely applied) exception set forth in Rule of Civil Procedure 43(a). Rule 43(a) provides that, “[f]or good cause shown in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” The advisory committee notes to Rule 43 explain what does—and as particularly relevant here, what does not—constitute “good cause in compelling circumstances.” “The most persuasive showings . . . are most likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.” Fed. R. Civ. P. 43(a) advisory committee notes (1996 amendment). “An unforeseen need for the testimony of a remote witness that arises during trial . . . may [also] establish good cause and compelling circumstances.” *Id.* The advisory committee warned expressly that “[o]ther possible justifications for remote transmission must be approached cautiously,” *id.*, and that “[a] party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in [making the requisite] showing.” *Id.*; *see also Garza-Castillo v. Guajardo-Ochoa*, No. 2:10-cv-00359-LDG, 2012 WL 15220, at \*1 (D. Nev. Jan. 4, 2012) (“The

commentary makes clear that compelling circumstances will generally refer to unexpected circumstances.”).

Here, the reasons or circumstances that preclude Mr. Pott from appearing at trial in Boston are not “*unexpected*” or “*unforeseen*.” Far from it. It has never been lost on Plaintiffs that Mr. Pott was a potential witness and one who was outside the subpoena power of the trial court. The witnesses in this case have been known for over a year—in fact, the AstraZeneca Defendants identified Mr. Pott as an “Individual[] Likely to Have Discoverable Information” in their Rule 26(a)(1) disclosures (which were served in February 2013, seven months before fact discovery closed). Ex. 4 (Rule 26(a)(1) Initial Disclosures of the AstraZeneca Defendants at 2, 6). Other AstraZeneca witnesses who were deposed long ago explained Mr. Pott’s role in the negotiation of the settlements at issue. And, indeed, AstraZeneca produced during discovery a transcript of an investigational hearing of Mr. Pott conducted by the Federal Trade Commission (“FTC”) in connection with an FTC investigation of the same issues (which has resulted in no complaint filed against any of the Defendants in the present case). Plaintiffs further have known from the outset of this litigation that none of the AstraZeneca Defendants is headquartered in or near Massachusetts and that AstraZeneca’s witnesses do not reside in the District of Massachusetts or within 100 miles of the court.

Notwithstanding all of this, and notwithstanding Rule 43’s express preference for videotaped depositions to remote transmissions, Plaintiffs chose not to depose Mr. Pott so that his testimony would be preserved for trial. *See* Fed. R. Civ. P. 43(a) advisory committee notes (1996 amendment) (“Ordinarily depositions, including video depositions, provide a superior

means of securing the testimony of a witness who is beyond the reach of a trial subpoena.”).<sup>2</sup>

That Plaintiffs in hindsight regret that decision cannot be remedied by Rule 43(a). *See Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (Plaintiff “proffered no ‘unexpected reason’ for [witness’s] absence from trial. . . . [Plaintiff] knew well in advance of trial that [witness] was based in Portland, Oregon, and he could have made arrangements ahead of time for introducing [witness’s] testimony, by deposition for instance.”); *Garza-Castillo*, 2012 WL 15220, at \*1-2 (“Given that more than a year has passed since Guajardo-Ochoa first became aware that it may be impossible for her mother and brother to travel to the United States to testify in court in her defense, and given that nearly a full year has passed in which she could have secured the testimony of her mother and brother by deposition (including video deposition), the Court cannot agree she has shown good cause *in compelling circumstances*.”) (emphasis in original)).<sup>3</sup>

Nor does it satisfy Rule 43 that Plaintiffs themselves may have a preference for live testimony to videotaped testimony. If a mere preference for live testimony satisfied the standard, then the standard would mean nothing at all—remote testimony by live video feed could occur in any case upon any party’s election. But Plaintiffs’ burden is not so light: “[W]hen the federal rule states a court may permit contemporaneous transmission ‘for good cause in compelling

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<sup>2</sup> *Accord Matovski*, 2007 WL 1575253, at \*2 (“The Notes to Rule 43 describe deposition testimony as ‘superior’ to contemporaneous transmission.”).

<sup>3</sup> *Accord Air Turbine Technology, Inc. v. Atlas Copco AB*, 217 F.R.D. 545, 546–47 (S.D. Fla. 2003) (alternatively ruling that Rule 43(a) not satisfied where “Plaintiff has known from the early stages of this case that witnesses from outside of the United States would be testifying about the trial” and “depositions of the witnesses in question have been taken”), *aff’d*, 410 F.3d 701, 714 (Fed. Cir. 2005); *Matovski v. Matovski*, No. 06 Civ. 4259 (PKC), 2007 WL 1575253, at \*3 (S.D.N.Y. May 31, 2007) (“The burden to the 8 witnesses has been known to petitioner from the inception of this proceeding. There is nothing ‘unexpected’ or ‘compelling.’ The application to have the 8 witnesses testify via contemporaneous transmission is denied.”).



circumstances’ the rule really means ‘for good cause in compelling circumstances.’” *Niemeyer v. Ford Motor Co.*, No. 2:09-CV-2091 JCM (PAL), 2012 WL 5199145, at \*2 (D. Nev. Oct. 18, 2012); *see Roundtree v. Chase Bank USA, N.A.*, No. 13-239 MJP, 2014 WL 2480259, at \*2 (W.D. Wash. June 3, 2014) (Rule 43(a) permits contemporaneous transmission “under exceptional circumstances”).

Mr. Pott should not be compelled to appear in Philadelphia to offer remote video testimony in a Boston trial.

## **II. PLAINTIFFS’ SUBPOENA OVERLY AND UNNECESSARILY BURDENS THE COURT.**

If not quashed, Plaintiffs’ subpoena will impose a significant burden on this Court and interrupt its normal course of operations. Plaintiffs will require here, in this courthouse, a dedicated courtroom with an elaborate setup—equipment for two-way audio-video transmission, cameras, laptops, monitors, phones, and headsets or headphones. A courtroom deputy must be provided and a court reporter procured; additional personnel may be diverted from their typical duties to ensure outsiders do not access the courtroom or interfere with the proceedings.

Plaintiffs will require these accommodations for a substantial part, if not all, of the six-week trial. The courthouse, in fact, will be crawling with Nexium trial witnesses, as Plaintiffs have subpoenaed at least six witnesses associated with AstraZeneca in addition to Mr. Pott (and numerous additional witnesses associated with the other defendants) to testify by remote transmission in this District. Plaintiffs have done so indiscriminately, without making any effort to prioritize their requests or mitigate the burden on this Court. And as intrusive and disruptive as all of this would be if confined to this single case, it would pale in comparison to the potential long-term interruption in the business of this District if Plaintiffs—based on this record—are

deemed to satisfy the “good cause in compelling circumstances” standard and testimony by remote video link becomes so easily obtainable by other parties here.

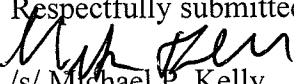
### **III. PLAINTIFFS’ SUBPOENA UNDULY BURDENS MR. POTT.**

Plaintiffs’ subpoena to Mr. Pott fails for an additional reason—it “subjects” him “to undue burden.” Fed. R. Civ. P. 45(d)(3)(iv). The subpoena does not specify with any precision the date and time of Mr. Pott’s anticipated testimony. It instead requires that he leave work and home and appear at the Philadelphia courthouse at 9:00 a.m. beginning October 6, 2014, and “return every day thereafter” during the anticipated six-week trial until he “is dismissed.” Ex. 1. It is obvious that such an overbroad subpoena unduly burdens the witness. That undue burden is particularly exacerbated in these circumstances, in which the witness is a senior executive with significant responsibilities and the subpoena calls for compliance at a remote location. Indeed, it is unfair not only to Mr. Pott, but to AstraZeneca as well, to expect the Company’s global General Counsel to drop his work for such an extended period of time and sit in the Philadelphia courthouse because Plaintiffs failed to depose him when they had the opportunity.

### **CONCLUSION**

For these reasons, Jeffrey Pott requests that the Court quash the subpoena requiring him to appear and testify via remote video transmission.

Dated: September 17, 2014

Respectfully submitted,  
  
/s/ Michael P. Kelly

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MCCARTER & ENGLISH, LLP  
Michael P. Kelly  
Renaissance Centre  
405 N. King Street, 8th Floor  
Wilmington, DE 19801  
Ph: 302-984-6301  
Fax: 302-984-2493  
mkelly@mccarter.com

Joshua Roberts  
BNY Mellon Center, Suite 700  
1735 Market Street  
Philadelphia, PA 19103

WILLIAMS & CONNOLLY LLP  
Dane H. Butswinkas (Of Counsel)  
John E. Schmidtlein (Of Counsel)  
Paul B. Gaffney (Of Counsel)  
725 Twelfth Street, N.W.  
Washington, DC 20005  
Ph: 202-434-5000  
Fax: 202-434-5029  
DButswinkas@wc.com  
JSchmidtlein@wc.com  
PGaffney@wc.com

*Counsel for Jeffrey A. Pott, AstraZeneca LP,  
AstraZeneca AB, and Aktiebolaget Hässle*

**UNITED STATES DISTRICT COURT  
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Antitrust Litigation*

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Mass.)

Miscellaneous Action No.

**DECLARATION OF BENJAMIN M. GREENBLUM IN SUPPORT OF MOTION OF  
JEFFREY A. POTT TO QUASH SUBPOENA TO APPEAR AND TESTIFY AT TRIAL**

BENJAMIN M. GREENBLUM, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an associate at Williams & Connolly LLP. I make this declaration in support of the motion of Jeffrey A. Pott to quash a subpoena served on him in connection with *In re: Nexium (Esomeprazole Magnesium) Antitrust Litigation*, MDL No. 2409, pending in the U.S. District Court for the District of Massachusetts (No. 1:12-md-02409-WGY) (“the Nexium MDL”).

2. Attached as Exhibit 1 is a true and correct copy of the Subpoena to Jeffrey A. Pott.

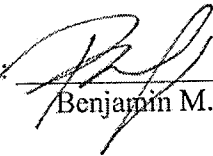
3. Attached as Exhibit 2 is a true and correct copy of the Clerk’s Notes and Order [ECF No. 966] entered on July 17, 2014 in the Nexium MDL.

4. Attached as Exhibit 3 is a true and correct copy of excerpts of the transcript of the July 11, 2014 hearing in the Nexium MDL.

5. Attached as Exhibit 4 is a true and correct copy of excerpts of the Rule 26(a)(1) Initial Disclosures of the AstraZeneca Defendants [ECF No. 340] in the Nexium MDL.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 17, 2014.  
Washington, D.C.

By:  \_\_\_\_\_  
Benjamin M. Greenblum

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

*In re: Nexium (Esomeprazole Magnesium)  
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**[PROPOSED] ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2014, upon consideration of  
the Motion of Jeffrey A. Pott to Quash Subpoena to Appear and Testify at Trial, and any  
response and/or reply thereto,

IT IS HEREBY ORDERED that said Motion is GRANTED.

\_\_\_\_\_  
, J.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Motion of Jeffrey A. Pott to Quash Subpoena to Appear and Testify at Trial, accompanied by a memorandum of law, declaration with exhibits in support thereof, and proposed order, was sent via U.S. First Class Mail, postage prepaid on September 17, 2014, to the following:

Thomas M. Sobol  
HAGENS BERMAN SOBOL SHAPIRO LLP  
55 Cambridge Parkway, Suite 301  
Cambridge, MA 02142

/s/ Michael P. Kelly  
Michael P. Kelly

# **Exhibit 1**



AO 88 (Rev. 02/14) Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

In re Nexium (Esomeprazole)  
Antitrust Litigation

Civil Action No. 12-md-02409-WGY

SUBPOENA TO APPEAR AND TESTIFY  
AT A HEARING OR TRIAL IN A CIVIL ACTION

To: Jeffrey A. Pott  
19 Jonathan Morris Circle, Media, PA 19063-1069

(Name of person to whom this subpoena is directed)

**YOU ARE COMMANDED** to appear in the United States district court at the time, date, and place set forth below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave. **See Attachment A for further information.**

Place: James A. Byrne U.S. Courthouse  
601 Market Street  
Philadelphia, PA 19106-1797

Courtroom No.: To be determined  
Date and Time: Beginning October 6, 2014 at  
9:00 a.m. and every day thereafter until dismissed

You must also bring with you the following documents, electronically stored information, or objects (leave blank if not applicable):

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date:

August 13, 2014

CLERK OF COURT

OR



Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party)

the Direct Purchaser Class Plaintiffs, who issues or requests this subpoena, are:

Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP  
55 Cambridge Parkway, Suite 301, Cambridge, MA 02142 tom@hbsslaw.com (617) 482-3000

**Notice to the person who issues or requests this subpoena**

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88 (Rev. 02/14) Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action (page 2)

Civil Action No. 12-md-02409-WGY

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

☐ I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_  
\_\_\_\_\_ *Server's signature*

\_\_\_\_\_ *Printed name and title*

\_\_\_\_\_ *Server's address*

Additional information regarding attempted service, etc.:

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

**Attachment A**

Your testimony at the location listed on the subpoena will be given via contemporaneous audio/video transmission to the courtroom in Boston, Massachusetts at which trial in this matter will be taking place. If, in lieu of testifying via audio/video transmission, you will agree to appear voluntarily in the Federal District Court for the District of Massachusetts, where this action is pending, in Boston, Massachusetts to testify, you or your counsel (if you have counsel representing you with respect to this matter) should contact Mr. Sobol.



Washington Trust Bank

Cashier's Check

2427293

Date: 8/12/14

Branch: 0085

REMITTER: NEXIUM LITIGATION SUPPORT

EXACTLY \*\*68 AND 23/100 DOLLARS

\$68.23

**PAY**  
**TO THE**  
**ORDER OF**

JEFFREY A. POTT

AUTHORIZED SIGNATURE

⑈0002427293⑈ ⑆125100089⑆ 1002311009⑈

# **Exhibit 2**

**United States District Court**  
**District of Massachusetts (Boston)**  
**CIVIL DOCKET FOR CASE #: 1:12-md-02409-WGY**

In Re: Nexium (Esomeprazole) Antitrust Litigation  
Assigned to: Judge William G. Young  
Case in other court: USCA, 14-01521  
USCA, 14-01522  
Cause: 15:1 Antitrust Litigation

Date Filed: 12/07/2012  
Jury Demand: Both  
Nature of Suit: 410 Anti-Trust  
Jurisdiction: Federal Question

Date Filed	#	Docket Text
07/11/2014	966	<p>ELECTRONIC Clerk's Notes for proceedings held before Judge William G. Young: Motion Hearing held on 7/11/2014 re <u>921</u> MOTION to Preclude Plaintiffs from <i>Untimely Disclosing a New Reasonable Royalty Expert</i> filed by TEVA USA, INC., Teva Pharmaceutical Industries, Ltd., <u>593</u> MOTION (<i>Direct Purchaser and End Payor Class Plaintiffs Motion to Exclude Certain Portions of the Expert Testimony of Gregory K Bell</i>) filed by Rochester Drug Co-Operative, Inc., Meijer Distribution, Inc., Value Drug Company, Burlington Drug Company Inc., Meijer, Inc., American Sales Company, LLC, <u>917</u> Cross MOTION in Limine - Plaintiffs' (<i>Direct Purchaser and End-Payor Classes and Retailer Plaintiffs</i>) Cross-Motion In Limine to Preclude Defendants' Selective Introduction of Evidence on Topics for Which They Purport to Invoke the Attorney filed by Direct Purchaser Plaintiffs, <u>830</u> MOTION - Direct Purchaser Class and End-Payor Class Plaintiffs' Motion for Live Trial Testimony Via Contemporaneous Transmission - filed by Rochester Drug Co-Operative, Inc., Meijer Distribution, Inc., Value Drug Company, Burlington Drug Company Inc., Meijer, Inc., American Sales Company, LLC, <u>844</u> MOTION in Limine To Preclude Argument or Evidence Based Upon Defendants' Invocation of Attorney-Client Privilege filed by AstraZeneca LP, Dr. Reddy's Laboratories, Inc., Dr. Reddy's Laboratories Ltd., Ranbaxy Laboratories, LTD, Ranbaxy Inc., Aktiebolaget Hassle, Teva Pharmaceutical Industries, Ltd., TEVA USA, INC., Ranbaxy Pharmaceuticals, Inc., RANBAXY LABORATORIES, LTD., Astrazeneca AB. After hearing from counsel the Court enters an Order denying <u>593</u> Motion (<i>Direct Purchaser and End Payor Class Plaintiffs Motion to Exclude Certain Portions of the Expert Testimony of Gregory K Bell</i>); granting <u>830</u> Motion Direct Purchaser Class and End-Payor Class Plaintiffs' Motion for Live Trial Testimony Via Contemporaneous Transmission; see transcript as to <u>844</u> Motion in Limine To Preclude Argument or Evidence Based Upon Defendants' Invocation of Attorney-Client Privilege; see transcript as to <u>917</u> Motion in Limine Plaintiffs' (<i>Direct Purchaser and End-Payor Classes and Retailer Plaintiffs</i>) Cross-Motion In Limine to Preclude Defendants' Selective Introduction of Evidence on Topics for Which They Purport to Invoke the Attorney; denying <u>921</u> Motion to Preclude Plaintiffs from <i>Untimely Disclosing a New Reasonable Royalty Expert</i>, however, only one (1) expert per discipline will be allowed. Plaintiff shall disclose which expert on or before Monday, July 14, 2014. A hearing will be held in September regarding the charge and verdict slip. Trial scheduled for October 2014. (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: various) (Gaudet, Jennifer) (Entered: 07/17/2014)</p>

# **Exhibit 3**



1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 12-md-02409-WGY

4  
5  
6 In Re: NEXIUM (ESOMEPRAZOLE)  
7 ANTITRUST LITIGATION

8  
9  
10 \*\*\*\*\*

11  
12 For Hearing Before:  
13 Judge William G. Young

14 Motion Hearing

15 United States District Court  
16 District of Massachusetts (Boston)  
17 One Courthouse Way  
18 Boston, Massachusetts 02210  
19 Friday, July 11, 2014

20 \*\*\*\*\*

21 REPORTER: RICHARD H. ROMANOW, RPR  
22 Official Court Reporter  
23 United States District Court  
24 One Courthouse Way, Room 5510, Boston, MA 02210  
25 bulldog@richromanow.com

A P P E A R A N C E S

THOMAS M. SOBOL, ESQ.  
Hagens Berman Sobol Shapiro, LLP  
55 Cambridge Parkway, Suite 301  
Cambridge, MA 02142  
Email: Tom@hbsslaw.com

and

JOHN D. RADICE, ESQ.  
Radice Law Firm, P.C.  
34 Sunset Boulevard  
Long Beach, NJ 08008  
Email: Jradice@radicelawfirm.com

and

BRUCE E. GERSTEIN, ESQ.  
Garwin Gerstein & Fisher, LLP  
88 Pine Street, 14th Floor  
New York, NY 10005  
Email: Bgerstein@garwingerstein.com  
For plaintiffs

LAURENCE A. SCHOEN, ESQ.  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.  
One Financial Center.  
Boston, MA 02111  
Email: Laschoen@mintz.com  
For Teva defendants

JOHN E. SCHMIDTLEIN, ESQ.  
PAUL B. GAFFNEY, ESQ.  
Williams & Connolly, LLP  
725 Twelfth Street, N.W.  
Washington, DC 20005  
Email: Jschmidtlein@wc.com  
For AstraZenca defendants

KEVIN D. McDONALD, ESQ.  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
Kdmcdonald@jonesday.com  
For the Dr. Reddy's defendants

## 1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE COURT: Well, good afternoon and welcome.

4 I understand why these particular motions in limine are  
5 ones that you very much would like the Court's decision  
6 on. I have prepared for this hearing and I have read  
7 all your extensive materials. In the main I am reminded  
8 why it is wise not to give oral hearings on motions in  
9 limine, most yield to analysis on the papers, and in  
10 large measure it's a waste of time.

11 In two aspects -- in one aspect I genuinely would  
12 be aided by an oral hearing and I look forward to it and  
13 those are the motions that are directed to the effect or  
14 role that the exercise of the attorney-client privilege  
15 has played here and that I look forward to your oral  
16 argument. The other one that I'd like to hear a little  
17 argument on is Teva's motion to preclude the plaintiffs  
18 from untimely disclosing a new reasonable royalty  
19 expert, and that's where we're going to start. The  
20 others I'll decide today, but I don't need oral argument  
21 on them. And let's start with the -- the arguments are  
22 not going to exceed 10 minutes on a motion here, but  
23 let's start with that one, Teva's motion to preclude the  
24 plaintiff from untimely disclosing a new reasonable  
25 royalty expert, Docket Number 921.

1 (Laughter.)

2 MR. SCHOEN: My heart is broken, your Honor.

3 THE COURT: That played out a little  
4 differently than I thought. But I'm fine with it.

5 Then what I'm going to do is rule on all these  
6 motions and then allow you to ask questions.

7 The plaintiffs' motion to exclude the expert  
8 testimony of Gregory Bell, that's denied. Of course  
9 challenges, particular challenges may be made at trial.  
10 But it's denied.

11 The plaintiffs' -- um, let's see. I dealt with  
12 Docket Number 917. That's the plaintiffs' motion to  
13 preclude the introduction of evidence on topics as to  
14 which the attorney-client privilege was asserted.

15 Plaintiffs' motion for live trial testimony via  
16 contemporaneous transmission, Docket Number 830, I'm  
17 fine with that and the burden is entirely on the  
18 plaintiffs. Don't think I'm going to bat in some other  
19 court and our video hookups go court to court. The  
20 burden is entirely on you. But if I can get the visage  
21 of the person on the screen in this courtroom and  
22 examination can go on, then I'm fine with that. But  
23 it's your burden. As to this court's facilities and  
24 ability to do video conferencing, we will cooperate  
25 fully.

1 Defendants' motion to preclude argument or  
2 evidence based upon the attorney-client privilege, 844,  
3 I've dealt with that.

4 To preclude -- on the one Mr. Schoen argued, 921,  
5 to preclude the untimely disclosing of the new  
6 reasonable royalty expert, that's denied, but it's going  
7 to be one expert per discipline. And if we're going to  
8 have a *Georgia Pacific* analysis, we'll hear it from one  
9 person.

10 MR. SCHOEN: Your Honor, if I might ask if an  
11 order be entered requiring them to clarify immediately  
12 which of those experts it's going to be, um, so that we  
13 can prepare for trial, given that we should have done,  
14 as of August, which experts they're going to be using?

15 THE COURT: I think that's not unfair.

16 Who's going to testify?

17 MR. SOBOL: Monday, your Honor? Tom Sobol.

18 THE COURT: That's all right. Monday they'll  
19 tell you.

20 MR. SCHOEN: The other thing, your Honor, is  
21 also a request that they be required -- if it is  
22 Dr. McCool, who we didn't have a chance to depose  
23 previously, that they be ordered to produce him for  
24 deposition in Boston before the end of July and provide  
25 at least three dates when that could occur.

1 (Laughter.)

2 -- and he stood up and he said this, "What is the  
3 verdict slip going to look like?" And indeed that so  
4 concentrated the minds of the lawyers on the essentials  
5 that I -- I think it's an excellent suggestion. I  
6 encourage you to do it, but I do not order it. I will  
7 find time in September to discuss it and suggest to you  
8 that a -- I think it will make more sense to you once  
9 you see my opinion. So I hope -- not that I'm cutting  
10 any new ground, but you wrestle with these cases and  
11 their applications to the summary judgment record, I  
12 think it will be helpful to you where I think things are  
13 falling short, and in the case of causation as to  
14 Ranbaxy, why I did what I did.

15 So I encourage that and I will make time in  
16 September, apart from the final pretrial conference, to  
17 discuss those matters. Thank you.

18 Other questions?

19 MR. McDONALD: Your Honor, Kevin McDonald  
20 representing the Dr. Reddy's defendants. I had a  
21 question about the motion on the video testimony --

22 THE COURT: Yes.

23 MR. McDONALD: -- and your ruling. Just to  
24 clarify, um, I understood you to be saying that you'll  
25 be happy to have this courthouse hook up anything that

1 the plaintiffs hook them up with.

2 THE COURT: Or the defense, I mean.

3 MR. McDONALD: Exactly. But I wanted to  
4 clarify because we don't have control over some of the  
5 witnesses that they may want to pursue and if those  
6 witnesses don't want to cooperate with the plaintiffs in  
7 appearing for this, my own concern is that they will say  
8 to a judge somewhere else in the country, "No, Judge  
9 Young has ordered that this happen." And so I wanted to  
10 make sure that you're just saying that, as far as you're  
11 concerned, if it does happen, that's fine.

12 THE COURT: I've said what I've said. I don't  
13 think it needs clarification. It's the parties's  
14 responsibility. That's as much clarification.

15 MR. McDONALD: Thank you.

16 THE COURT: I have in mind very much your  
17 motion for reconsideration. In this draft, yet draft  
18 opinion, we've dealt with that directly. Don't think we  
19 just brushed that off. I've denied it, but I've dealt  
20 with it. You are somewhat differently situated and I'll  
21 get it to you just as soon as I can.

22 MR. GAFFNEY: Your Honor, Paul Gaffney for  
23 AstraZeneca.

24 With respect to the contemporaneous transmission  
25 motion, there was a proposed protocol attached to their

1 motion which -- I think given your Honor's ruling, that  
2 it's fine with me, but they'll work it out. I think  
3 maybe we need to revisit the mechanics of that. There  
4 was no discussion about that ahead of time.

5 There is one issue though that was raised in the  
6 briefing, which is their request that if they do put on  
7 a witness by video transmission who's a former or  
8 current employee, they ask that that person -- that the  
9 defendants themselves be precluded from calling that  
10 witness live in their case.

11 THE COURT: No, well, I would not be disposed  
12 to do that.

13 MR. GAFFNEY: Thank you.

14 THE COURT: Again, the reason I answer that  
15 without argument is I found that it's a good idea always  
16 to follow the same routine because all the lawyers can  
17 play off the same routine and mine is easily  
18 discoverable. Changes from the same routine aren't  
19 necessary in many cases, but the burden is on the one  
20 who wants to change it. My routine would always be to  
21 allow such a witness to be called and it is in this  
22 case, absent some special reason.

23 All right. I do thank you. I appreciate this. I  
24 would like to meet with you actually on the charge and  
25 verdict slip. I wish you a good summer. I am working



1 on the, um -- I am working on the opinion. But come to  
2 the sidebar before I let you go.

3 (Sidebar off the record.)

4 THE COURT: We'll recess.

5 (Ends, 2:45 p.m.)

6  
7 C E R T I F I C A T E

8  
9 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
10 do hereby certify that the foregoing record is a true  
11 and accurate transcription of my stenographic notes  
12 before Judge William G. Young, on Friday, July 11, 2014,  
13 to the best of my skill and ability.

14  
15  
16 /s/ Richard H. Romanow 07-25-14

17 RICHARD H. ROMANOW      Date  
18  
19  
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25

# **Exhibit 4**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

*In re: Nexium (Esomeprazole Magnesium)  
Antitrust Litigation*

This Document Relates to All Actions

MDL No. 2409

Civil Action No. 1:12-md-02409-WGY

**RULE 26(a)(1) INITIAL DISCLOSURES OF  
ASTRAZENECA DEFENDANTS**

Defendant AstraZeneca LP, AstraZeneca AB and Aktiebolaget Hassle (collectively, "AstraZeneca"), by its attorneys, hereby provides the following initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) and the Case Management Order, dated February 4, 2013 (Dkt No. 115) ("CMO"). These disclosures are based upon information reasonably available to AstraZeneca at this time. By making these disclosures, AstraZeneca does not represent that it is identifying every document, tangible thing, or witness potentially relevant to these lawsuits. AstraZeneca reserves the right to supplement and/or amend these disclosures as further information becomes available.

These disclosures represent a good-faith effort to identify discoverable information that AstraZeneca reasonably believes may be used to support its defenses, as required by Fed. R. Civ. P. 26(a)(1). These disclosures do not include information that may be used solely for impeachment purposes. These disclosures are made without waiving: (i) any claim or defense as to the sufficiency of the Complaint; (ii) any claim of privilege or work product; (iii) the right to object on the grounds of competency, relevancy, materiality, hearsay, or any other proper ground, to the use of any such information, for any purpose, in whole or in part,

in any subsequent proceeding in this action or any other action; or (iv) the right to object on any and all grounds, at any time, to any discovery request or proceeding involving or concerning the subject matter of these disclosures.

All of the disclosures set forth below are made subject to the above objections and qualifications. Further, AstraZeneca reserves all rights to present at trial additional witnesses and evidence not presently identified or encompassed by these disclosures, and to present any rebuttal or impeachment evidence it deems appropriate. Nothing in this initial disclosure of documents, witnesses, or other information shall constitute an admission or concession on the part of AstraZeneca with respect to any issues of fact or law, including, but not limited to, the relevance of any of the information set forth herein.

**A. Individuals Likely to Have Discoverable Information**

Based on information reasonably available to AstraZeneca at this time, and with the caveat that this matter is in its earliest stages, the following current or former AstraZeneca employees and outside counsel with substantial responsibility for the subject matter indicated are likely to have discoverable information that AstraZeneca may use to support its defenses in this litigation, not including information used solely for impeachment. As discovery proceeds, AstraZeneca may determine that other individuals, including individuals not employed by AstraZeneca, have relevant information that it may use to support its defenses, and AstraZeneca reserves the right to supplement these disclosures under Rule 26(e) of the Federal Rules of Civil Procedure.

A brief identification of the subjects on which each listed individual may have discoverable information is also provided. Pursuant to the CMO, AstraZeneca has attempted in

good faith to meet the substance of the non-objectionable information requested in the withdrawn Interrogatory Nos. 1-5, dated December 10, 2012, regarding the knowledge of persons identified below. The general subject matter of information listed for each individual does not in any way limit AstraZeneca's right to question or call any individual listed to testify regarding any other subject. AstraZeneca reserves the right to retain one or more experts in this matter and will disclose the identities of its experts, if any, in accordance with the schedule ordered by the Court.

Individual	Affiliation	General Subject Matter
Sese Abhulimen	Former AstraZeneca employee	Sales forecasting of Nexium in the United States.
Richard Barker	Current AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy
Charles Bodner	Former AstraZeneca employee	Sales forecasting of Nexium in the United States.
Terri Bowman	Current AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy and AstraZeneca and Teva.  AstraZeneca's Communications with the Federal Trade Commission concerning Nexium.
David Brennan	Former AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy.

Individual	Affiliation	General Subject Matter
Matt Diggons	Current AstraZeneca employee	Sales forecasting of Nexium in the United States.
Ed Dixon	Covington & Burling LLP	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy
Glenn Engelmann	Former AstraZeneca employee	Negotiation, evaluation or authorization of the settlement agreements between AstraZeneca and Ranbaxy.
Rich Fante	Current AstraZeneca employee	Marketing of Nexium in the United States.
Judy Firor	Current AstraZeneca employee	AstraZeneca's communications with the Food and Drug Administration concerning Nexium.
Steve Fishwick	Current AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy.
Lakshmi Gengler	Former AstraZeneca employee	Sales forecasting of Nexium in the United States.
Kenneth Graham	Current AstraZeneca employee	Marketing of Nexium in the United States.
Matt Gray	Current AstraZeneca employee	Sales forecasting of Nexium in the United States.

Individual	Affiliation	General Subject Matter
Marcus Heifetz	Current AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy, AstraZeneca and Teva, and AstraZeneca and DRL.
Timothy Hester	Covington & Burling LLP	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy, AstraZeneca and Teva, and AstraZeneca and DRL.
Pia Janson	Former AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy.
Derek Jones	Current AstraZeneca employee	Sales forecasting of Nexium in the United States.
Mariam Koohdary	Current AstraZeneca employee	Communications with the FTC.
George Kummeth	Current AstraZeneca employee	AstraZeneca's communications with the Food and Drug Administration concerning Nexium.
Evan Lippman	Current AstraZeneca employee	Marketing of Nexium in the United States.
John McCarthy	Current AstraZeneca employee	Marketing of Nexium in the United States.
Marion McCourt	Current AstraZeneca employee	Marketing of Nexium in the United States.
Therese Meaney	Current AstraZeneca employee	Sales forecasting of Nexium in the United States.

Individual	Affiliation	General Subject Matter
Luke Mette	Current AstraZeneca employee	Communications with the FTC.
Will Mongan	Current AstraZeneca employee	Marketing of Nexium in the United States.
Linda Palczuk	Current AstraZeneca employee	Marketing of Nexium in the United States.
Jeffrey Pott	Current AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy, AstraZeneca and Teva, and AstraZeneca and DRL.
Gary Rowles	Current AstraZeneca employee	Sales forecasting of Nexium in the United States.
Peter Safir	Covington & Burling LLP	Negotiation, evaluation or authorization of the agreements between AstraZeneca and Ranbaxy
Thomas Stevens	Former AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and DRL.
David Snow	Current AstraZeneca employee	Marketing of Nexium in the United States.
Judy Yun	Current AstraZeneca employee	Negotiation, evaluation or authorization of the agreements between AstraZeneca and DRL.

AstraZeneca does not consent to communication by Plaintiffs, or their counsel, with AstraZeneca or its employees/agents or former employees/agents as to matters within the



Dated: February 15, 2013

Respectfully submitted,

By:

/s/ Jonathan Gimblett  
Timothy C. Hester (*pro hac vice*)  
Jonathan Gimblett (*pro hac vice*)  
Andrew D. Lazerow (*pro hac vice*)  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 662-6000 (telephone)  
(202) 662-6291 (facsimile)  
thester@cov.com  
jgimblett@cov.com  
alazerow@cov.com

William A. Zucker, Esq., BBO # 541240  
MCCARTER & ENGLISH, LLP  
265 Franklin Street  
Boston, MA 02110  
617.449.6500  
617.607.9200 (facsimile)  
wzucker@mccarter.com

*Counsel for AstraZeneca LP, AstraZeneca  
AB, and Aktiebolaget Hassle*